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No. 83-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GWELDON LEE PASCHALL AND INTERVENORS,
Petitioners,

v.

THE KANSAS CITY STAR COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a monopoly newspaper is permitted under the antitrust laws to distribute its own product directly to subscribers and to stop selling at wholesale to middlemen.

2. Whether the record in this case supports the court of appeals' *en banc* decision that petitioners failed to prove that respondent's plan to distribute its own newspapers was unlawfully anticompetitive.

PARTIES TO THE PROCEEDING

Petitioners are listed in the appendix to the Petition at A139-54. Respondent is the Kansas City Star Company.*

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* Respondent construes the terms "parent companies," "subsidiaries," and "affiliates" in Rule 28.1 of the Rules of this Court to mean those corporations (1) the shares of which are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries" and "affiliates," a majority of the shares of which are owned by a party. With the terms so defined, respondent the Kansas City Star Company has a parent company, Capital Cities Communications, Inc., and no subsidiaries or affiliates.

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STATEMENT OF THE CASE

The Kansas City Star Company ("The Star") owns and publishes two daily newspapers in Kansas City, Missouri. For many years, The Star has distributed its newspapers by selling them at wholesale to distributors, who in turn resell and deliver them to subscribers. These distributors do not compete with each other in any significant way. A3.[1] They are, instead, "natural monopolies."[2]

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[1] References to the Appendix to the Petition for a Writ of Certiorari are cited herein as "A—".

[2] Amicus Curiae Brief in Support of Certiorari [hereinafter "Amicus Brief"] at 12.

Under the decision of this Court in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), so long as The Star sells through middlemen, it cannot place any limit on the prices the middlemen charge. Because The Star has thus been unable to limit the prices charged by its distributors, by 1977 newspaper readers in the Kansas City area were paying anywhere from $3.00 to $6.75 per week for the same newspapers, depending on where they happened to live. A42-43, A69. There were similar variations in the collection, payment, and customer complaint policies from one distributor's area to another. A22, A98.

In the years after the *Albrecht* decision, other newspaper publishers throughout the country faced similar problems. Many of them solved these problems by selling their newspapers directly to subscribers, instead of through middlemen. Some of these publishers replaced the middlemen with independent delivery agents; others with employees. All sought to establish uniform prices and to improve services to their subscribers.

In September 1977, The Star followed the lead of these other publishers around the country and decided to begin selling its newspapers directly to subscribers. The Star did so in order to eliminate disparities in the retail prices charged to its customers, to improve service and to make billing policies more unform. A8, A98. At the same time, The Star offered to enter into independent agency contracts with its former distributors under which former distributors would earn approximately the same income as they had previously received as middlemen. A4, A99. In addition, under the agency contracts, each distributor would be free to distribute other publications—including other newspapers. A99. The distributors would in no sense be employees of The Star; they would, for example, be free to set their own hours and working conditions, as well as to determine to a substantial degree how much they earn (through control of their costs and increases in sales).

Rather than accepting The Star's offer, petitioner Gweldon Lee Paschall (one of The Star's distributors) commenced proceedings in the United States District Court for the Western District of Missouri seeking an injunction requiring The Star to continue selling newspapers to him at wholesale. He was subsequently joined by the other petitioners. Petitioners alleged that The Star's planned change to an agency distribution system would violate Section 2 of the Sherman Act, 15 U.S.C. § 2.

After trial on the merits, the district court ruled that The Star would violate Section 2 of the Sherman Act by taking over distribution of its own newspapers. The court found that The Star proposed to change its distribution system for legitimate business reasons. A98. Nevertheless, the district court ruled that The Star's proposed change was unlawfully anticompetitive. The court's ruling did not lie in any finding that The Star's forward integration would eliminate actual competition among petitioners or between The Star and petitioners, for it found no such competition. A94. Nor did the court find that The Star's forward integration would unlawfully buttress its monopoly position, for The Star had explicitly provided that petitioners could distribute other publications. A99. And unlike petitioners, the court placed no weight on the undisputed fact that 29 years ago The Star was convicted and fully punished for illegally tying newspaper and radio advertising together. Instead, the court based its ruling solely on the finding that The Star's forward integration would eliminate "potential competition." The court found that the threat that The Star may enter into distribution of its own product at some future time had had a "retardant effect" on the desires of the distributors to charge higher prices and that forward integration by The Star would end that threat. A98. The court assumed without explanation that, if potential competition by The Star had a retardant effect on distributors' prices, then the con-

verse also must be true—potential competition by the distributors would have a retardant effect on The Star's prices. A98.

The Star appealed. It was supported on its appeal by the Antitrust Division of the United States Department of Justice, which agreed that the district court decision was a serious departure from accepted law and antitrust policy. Nevertheless, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed. Like the district court, the panel majority ruled that The Star would violate Section 2 if it took over distribution of its papers and thereby eliminated the potential competition that it represented as a potential distributor. A40-41. In addition, the panel claimed support for its ruling in facts not found by the district court—that The Star had announced a retail price increase at the same time as it announced the change in its distribution system and that The Star planned to eliminate variations in services offered by the various distributors collectively throughout The Star's customers areas. A42-44.

Judge Henley dissented from the majority decision of the panel on the ground that petitioners had not shown that forward integration by The Star would produce unreasonable anticompetitive effects. Judge Henley recognized—as have other courts and expert commentators—that forward integration by a monopolist could be anticompetitive where it would facilitate price discrimination, increase market power by raising barriers to entry, or enable the monopolist to evade government regulation. Because petitioners did not even allege, much less prove, that the proposed change in The Star's distribution system would produce any of these effects and failed to demonstrate any other unreasonable anticompetive effects, Judge Henley concluded that petitioners had not proved their case. A66-68.

The Star, supported by the Antitrust Division, suggested *en banc* review of the case, which was ordered by

the full Court of Appeals for the Eighth Circuit. After hearing reargument, the full court reversed the District Court ruling. In the *en banc* court's view, "[n]either vertical integration nor a unilateral refusal to deal is *per se* illegal." A10. Rather, the question here depended upon whether petitioners had carried their burden of proving that The Star's forward integration would result in any unreasonable anticompetitive effects in this particular case. After reviewing the facts in detail, the court concluded, with three judges dissenting, that petitioners had failed to prove that the new system would be anticompetitive. Petitioners seek review of this determination.

SUMMARY OF ARGUMENT

The original decisions of the district court and the court of appeals panel were contrary to every prior decision in the area, were without support in the prior decisions of this Court, and would have had the practical effect of making it unlawful for any monopolist to take over distribution of its own product. Because those decisions were wrong and unprecedented, the Antitrust Division of the United States Justice Department appeared as *amicus curiae* before both the panel and the *en banc* court to urge reversal.

The decision of the *en banc* court, however, has eliminated any need for review by this Court. As it now stands, this case is merely one more in a long line of cases involving newspaper publishers taking over direct distribution of their product for legitimate business reasons. In each of the cases, the courts have rejected antitrust challenges to the publishers' actions and upheld their change from distribution by middlemen to direct distribution to subscribers.

The approach taken by the Eighth Circuit is entirely consistent with prior decisions of this Court. Each of the decisions relied upon by petitioners and *amicus* is readily distinguishable. None involved a manufacturer's

decision to switch from distribution through middlemen to direct distribution, and in each there was proof that the action challenged had had or would have substantial, unreasonable anticompetitive effects. In the present case, there was no such proof.

Nor does the decision of the Eighth Circuit raise any issue about judicial process. Contrary to petitioners' claims, there is nothing inherently anticompetitive in forward integration by a monopolist. Whether such action will violate Section 2 of the Sherman Act depends upon the facts of the particular case. It was this principle—not any supposed "presumption"—that the court of appeals applied here.

The court of appeals correctly concluded that the record in this case was insufficient to satisfy petitioners' burden of proving that The Star's plan to take over its distribution would be unlawfully anticompetitive. The record contains evidence—and the district court found—that The Star's plan would serve legitimate, procompetitive purposes, and it shows that The Star's proposed forward integration would not result in any of the anticompetitive effects that this Court and the lower federal courts have found to violate Section 2 of the Sherman Act when a monopolist seeks to integrate forward. The court of appeals' conclusion that The Star's proposal would not be anticompetitive was thus fully justified; in any event, the application of established law to the facts of a particular case does not raise an issue worthy of review by this Court.

ARGUMENT

I. THE COURT OF APPEALS APPLIED ESTABLISHED, UNCONTROVERSIAL PRINCIPLES OF ANTITRUST LAW.

A. The Court Of Appeals' Ruling Is Consistent With That Of Every Other Lower Court That Has Addressed The Issue.

Problems like those faced by The Star in Kansas City have caused newspaper publishers around the country to take over distribution of their own newspapers. In many instances, like this case, disgruntled distributors have challenged the publishers' new distribution systems under the antitrust laws, but their challenges have been rejected in every case. Indeed, at least ten federal courts have addressed the question whether forward integration in the newspaper industry violates the antitrust laws. Each has concluded—like the court of appeals here—that it does not.[3]

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[3] *See Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Naify v. McClatchy Newspapers*, 599 F.2d 335 (9th Cir. 1979); *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979); *Grill v. Reno Newspapers, Inc.*, 6 Media L. Rep. (BNA) 1818 (D.Nev. 1980); *Neugebauer v. A.S. Abell Co.*, 474 F. Supp. 1053 (D. Md. 1979); *Hardin v. Houston Chronicle Publishing Co.*, 434 F.Supp. 54 (S.D. Tex. 1977), *aff'd mem.*, 572 F.2d 1106 (5th Cir. 1978) ("On the showing plaintiffs have made, if the Chronicle were enjoined, a manufacturer could be prevented from ever replacing a system of independent distributors with its own system of direct sales . . . The antitrust laws do not provide any basis for such a result. Courts have uniformly refused to enjoin newspaper publishers from changing, for valid business reasons, their systems of distribution from that of independent distributors to direct sales"); *Knutson v. Daily Review, Inc.*, 383 F.Supp. 1346 (N.D. Cal. 1974), *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) ("Thus, a manufacturer can lawfully terminate an independent distributor and thereafter sell exclusively through its own outlets"); *Lamarca v. Miami Herald Publishing Co.*, 395 F.Supp. 324 (S.D.Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975) ("A manufacturer may legally

The most recent of these cases, *Auburn News*, is directly on point. In *Auburn*, a monopolist was charged with violating Section 2 of the Sherman Act by trying to sell its publications directly to customers and avoiding the need for selling to middlemen. Quoting this Court's decision in *United States v. Columbia Steel Co.*, 334 U.S. 495, 525-26 (1948), the court of appeals started with the premise that "vertical integration, as such without more, cannot be held violative of the Sherman Act." Rather, "the extent of permissible integration must be governed, as other factors in Sherman Act violations, by the other circumstances of individual cases." 659 F.2d at 278. Based on a review of the facts, the court in *Auburn* held that the newspaper publisher's forward integration into distribution did not violate the antitrust laws.

In the face of the uniform lower court authority supporting the result reached by the court of appeals here, petitioners do not even suggest that the decision of the court of appeals raises a conflict with decisions of any other court within the meaning of Rule 17.1(a) of this Court.[4] *Amicus*, however, asserts that "[o]ther circuits have indicated that deliberately moving a monopoly downstream should be *per se* or presumptively unlawful," citing *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966), and *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958). Amicus Brief at 8. Neither of these cases, however, stands for that proposition;

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change the system of distribution of its products when sound business consideration[s] dictate that a different system be used"); *McGuire v. Times Mirror Co.*, 405 F.Supp. 57 (C.D.Cal. 1975); *Newberry v. Washington Post Co.*, 438 F.Supp. 470 (D.D.C. 1977).

[4] The most that petitioners can do is to quote language from *Byars v. Bluff City News Co.*, *supra*, to the effect that Section 2 of the Sherman Act requires a careful examination of the competitive effects of a monopolist's forward integration in each case. Petition at 18. As shown below, the court of appeals in this case made such an examination. *Byars* itself supports the approach taken by the court of appeals in this case.

indeed, neither involved newspapers or distribution issues at all.

In *Packaged Programs,* the owner of the only television station in Pittsburgh was alleged to have arbitrarily used its position to drive out of business a competitor in the program production business. The defendant was not integrating backward generally for some legitimate business purpose. The court held only that plaintiff had stated a claim under the antitrust laws and remanded the case for further proceedings to determine whether the broadcaster's action was justified by legitimate business concerns.

Six Twenty-Nine Productions was similar. There, the court of appeals reversed a district court judgment on the pleadings. The only thing that the court of appeals decided with respect to the Section 2 claim was that "the complaint is sufficient if the refusal of defendant to accept advertising from plaintiff by setting up unreasonable standards or by adopting an arbitrary course of action is for the purpose of destroying plaintiff as an agency and thereby furthering a course toward monopolization." 365 F.2d at 483.

In the present case, both the district court and the court of appeals expressly found that The Star's planned forward integration was motivated by legitimate business reasons—not by any specific intention to monopolize. A8, A98. Both *Packaged Programs* and *Six Twenty-Nine Productions,* therefore, are readily distinguishable and raise no conflict among the circuits for this Court to resolve.

B. The Uniform Rulings Of The Lower Federal Courts Are Consistent With Prior Decisions Of This Court.

In the absence of any conflict among the circuits, petitioners and *amicus* assert that the ruling of the Eighth Circuit (and thus the rulings of all the other federal courts that have addressed the issue) conflict with prior

decisions of this Court. They argue that under these decisions forward integration by The Star is presumptively unlawful. Petition at 16, 20; Amicus Brief at 7-10. But neither petitioners nor *amicus* can point to any decision of this Court establishing such a rule. Instead, they point to general language of the Court in cases that have nothing to do with the present situation and to four monopolization cases that, far from impeaching the approach of the court of appeals here, in fact support it.

It is not the law that forward integration by a monopolist should always or even generally be considered unlawfully anticompetitive. To the contrary, this Court has consistently said that actions by a monopolist violate Section 2 of the Sherman Act only where the intended or actual effects are anticompetitive under the circumstances of the particular case.[5] In the present case, the court of appeals correctly found that The Star's forward integration would not unlawfully increase its market power and thus, applying the approach set forth by this Court, concluded that the proposed forward integration would not violate Section 2 of the Sherman Act.

Petitioners nevertheless contend that the court of appeals' decision in this case is somehow in conflict with this Court's decisions in *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Eastman Kodak Co. v. Southern Materials Co.*, 273 U.S. 359 (1927); and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). But these cases have nothing to do with the present case.

—In *Griffith*, the owner of motion picture theatres sought to increase its market power in towns where it competed by using its monopoly position in other towns to demand special rights to first-run motion pictures.

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[5] *United States v. Columbia Steel Co.*, 334 U.S. 495, 525-26 (1948); *United States v. Paramount Pictures*, 334 U.S. 131, 173-74 (1948); *see United States v. Grinnell*, 384 U.S. 563 (1966).

The effect of this horizontal extension of monopoly power was to enable the monopolist to use its monopoly position in one geographic market to extract monopoly profits from different consumers in a different geographic market—an anticompetitive effect not even alleged in the present case.[6]

—*Paramount Pictures* was primarily a horizontal case involving a group of motion picture producers and distributors who entered into a complex set of restraints and agreements as part of a conspiracy to monopolize motion picture theatres. Many of the theatres were jointly owned by two or more defendants. The case did not involve a decision by a single firm to distribute its own product at retail, but rather "a conspiracy to effect a monopoly through restraints of trade." 334 U.S. at 171. The Court rejected the government's argument that vertical integration is illegal *per se* and held, instead, that vertical integration is illegal if it is "a calculated scheme . . . to restrain or suppress competition, rather than expansion to meet legitimate business needs." *Id.* at 174. In the instant case, there is no allegation of conspiracy between The Star and anyone else, and it is agreed that The Star was motivated by legitimate business concerns. A8, A98.

—In *Eastman Kodak*, defendant Kodak, a monopolist of photographic supplies, refused to sell supplies to plaintiff distributor except at retail prices. The Court affirmed a jury verdict finding Section 2 liability on the

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[6] Petitioners' reliance on *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) is similarly misplaced. Petition at 16. In *Berkey*, defendant Kodak was charged with employing a variety of devices to extend monopoly power from its film product to other products, cameras and processing equipment, thereby reaping additional monopoly profits from a different set of customers. Most of these charges were rejected, and none involved distribution of a single product.

ground that Kodak's refusal to deal was in furtherance of a plan to monopolize the manufacture and sale of photographic equipment by acquiring control of competing manufacturers and dealers and imposing restraints on others. Had Kodak's plan succeeded, it would have been more difficult for others to enter the photographic supply business because they would have had to establish both a production system and a distribution system. In this case, in contrast, The Star is not attempting to acquire any businesses, and its agents would be free to distribute competing publications, so the new system could not entrench The Star's monopoly.

—In *Otter Tail Power*, the monopoly power company was prevented from exercising its full market power at the wholesale level because of federal government regulation. In an effort to circumvent that regulation, it sought to extend its monopoly into the retail power business where it could exercise monopoly power and charge monopoly prices without regulatory constraint. To that end, it refused to sell or transmit power to local power companies and brought litigation and used other tactics to prevent them from obtaining power from other wholesalers. In the present case, of course, there is no governmental or other limitation on The Star's ability to set wholesale prices according to its own interests, so there is no issue of evading regulatory constraint. And The Star has done nothing to prevent petitioners from obtaining newspapers or other products from other manufacturers.

Amicus seeks to buttress petitioners' claims of a conflict with prior decisions of this Court by suggesting that the rulings in *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), and *Associated Press v. United States*, 326 U.S. 1 (1912), might apply to the present case. But both were cases in which competitors had agreed with one another to pool their resources and

exclude other competitors. They therefore have no application to the present case.[7]

In sum, the prior decisions of this Court support, rather than contradict, the decision of the court of appeals in this case. This Court has rejected the notion that vertical integration is presumptively unlawful. It has found forward integration by a monopolist to be anticompetitive in two situations—where integration will increase barriers to entry at the manufacturing level or facilitate circumvention of government regulation—neither of which exists here. None of the cases cited by petitioners or *amicus* supports the proposition that a monopolist's decision to distribute its own product to consumers, instead of through middlemen, is unlawful.

II. THE COURT OF APPEALS' HOLDING THAT PETITIONERS FAILED TO CARRY THEIR BURDEN OF PROVING UNREASONABLE ANTICOMPETITIVE EFFECTS IS CORRECT AND, IN ANY EVENT, RAISES NO IMPORTANT ISSUE REQUIRING REVIEW BY THIS COURT.

The court of appeals properly held, and petitioners do not dispute, that petitioners had the burden of proving that vertical integration by The Star would create unreasonable anticompetitive effects (A18; Petition at 14).[8] The court of appeals also held that petitioners had not

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[7] *Amicus'* lame suggestion that these cases may have some relevance because The Star, many years ago under prior ownership, was convicted and fully sanctioned for entirely unrelated antitrust charges (Amicus Brief at 10) finds no support in the decisions of this (or any other) Court or in common sense.

[8] A23. Both the *en banc* and panel opinions below accepted the uniformly recognized rule that, absent proof of unreasonably anticompetitive effects, forward integration by The Star would not violate Section 2 of the Sherman Act. A11, A18, A37. They differ only over the factual issue of whether petitioners carried their burden of proving such effects in this case.

met their burden of proof. Petitioners now urge this Court to grant certiorari to review that decision.

Petitioners attempt to bootstrap this everyday issue of burden of proof into one of public importance by contend- that the appeals court improperly relied on an alleged "legal presumption" based upon "abstract economic theory" and "deductive" analysis rather than basing its decision on facts in the record. Petition at 12, 21. Petitioners' argument misconstrues the decision below and wholly ignores petitioners' failure to produce at trial the facts necessary to carry their burden of proof.

The court of appeals explicitly recognized that its decision must be based on the facts of the case (A17), and the record below amply supports the court's conclusion that petitioners failed to prove that The Star's plan to distribute its own product was anticompetitive. First, the trial court specifically found that the change in the distribution system would serve legitimate, procompetitive purposes:

> The defendant is correct in urging that changing to a delivery agent system had legitimate business reasons for its adoption. The new system would give the company control over pricing to the subscriber, thereby being able to advertise subscription prices, which is quite impossible where carriers largely determine the ultimate specific prices. It would permit the company to assure more rapid "starts" for new subscribers, and would allow uniform policy regarding time of collection, manner of payment by customers, and method of responding to customer complaints, all of which have been problems under the independent contract carrier system. A98.

By contrast, there was no evidence of actual anticompetitive effects. The trial court specifically held that there was no evidence that the change in the distribution system would raise barriers to entry at the publication level. A99-100. It was conceded that the distributors did

not compete among themselves, so the district court properly found that the proposed change would not adversely impact existing competition in the distribution of The Star's newspapers. A94. And, as the *en banc* majority explained, the panel's *de novo* findings regarding prices and services were unsound: There was no evidence that the change in the distribution system would cause higher prices,[9] and the panel majority had misconstrued the evidence regarding subscribers services.[10]

The sole basis for the trial court's finding of liability was a theory of potential competition. The trial court

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[9] A19-20. The panel noted that, when The Star announced its plan to change its distribution system, it announced a retail price that was higher than that previously charged by many (but not all) of the distributors. As Judge Henley pointed out in his dissent to the panel decision, however, The Star could have raised its prices either as a wholesaler or as a retailer. It announced a new retail price increase because it was planning to sell the papers at retail and would have raised its price in any event if required to do so by general economic conditions. A69-70.

[10] A22. The panel suggested, and petitioners here assert, that The Star's forward integration would have the effect of reducing variations in the services now provided by petitioners. Petition at 7-8, A43-44. But nothing in the record suggests that the various services offered by petitioners collectively are available to the subscribers in any one area. To the contrary, because petitioners do not compete with one another, the variations in service mean simply that some subscribers are treated differently from others. A69-70. The court of appeals properly concluded that putting an end to those differences is not anticompetitive.

The panel also suggested that The Star's new distribution plan is somehow improper because The Star hopes to increase its profits by reducing the profits of its distributors. A44-45. This suggestion, too, is unsupported—indeed, contradicted—by findings of the trial court. A99. Even if true, it would be of no legal significance. Distributors' profits are one of the costs of distribution incurred by The Star, and reducing those costs itself increases efficiency. *See, e.g., Continental T.V., Inc. v. GTE-Sylvania Inc.*, 433 U.S. 36, 56 n.24 (1977).

found that the prospect of The Star's entering and competing against petitioners had forced petitioners to keep down their retail prices. The trial court assumed that the converse would be true—that the presence of petitioners would force The Star to keep down its retail prices. There was, however, no evidence to support that assumption, on which the potential competition theory rests.

Not surprisingly, the appellate court concluded, as had the panel dissent, that the potential competition theory was not sufficient to fill in the gaps in petitioners' proof. A23, A66. Petitioners attack that conclusion on the ground that the appellate court improperly relied on a different economic theory. But petitioners' argument is misplaced.

It is petitioners who relied on economic theory—in their case, an unprecedented "potential competition" theory—to meet their burden of proof.[11] The court of appeals simply tested petitioners' "potential competition" theory in light of learning about vertical integration that is well-established in the case law, as well as the economics texts.[12] That learning, which the court of appeals

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[11] As the *en banc* decision explains, potential competition theories have been used to prohibit the merger of two parties where the evidence establishes very particular circumstances in which the merger might reduce competition. A11-12. As even the trial court recognized (A85), however, notions of potential competition have never been used in cases involving a decision by a single firm to distribute its own product.

[12] *See, e.g., Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979); *Knutson v. Daily Review, Inc.*, 383 F.Supp. 1346, 1363-64 (N.D. Cal. 1974); *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); P. Areeda, Antitrust Analysis—Problems, Text, Cases 643-45 & n.5 (3d ed. 1981); R. Posner & F. Easterbrook, Antitrust—Cases, Economic Notes and Other Materials 875-76 (2d ed. 1981). *See generally Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 (1977).

There is no serious dispute about the legal and economic learning to which the court of appeals referred. The one textbook

called the optimum monopoly price theory, makes clear that the potential competition theory on which petitioners relied is badly flawed.

The court of appeals' reasoning was very simple and very ordinary.[13] It rested on the common sense notion that a monopolist loses customers as it increases its prices. In order to maximize its own profits, a monopolist (or, for that matter, any manufacturer) wishes to create the largest possible difference between its prices and its costs. It thus has an incentive to minimize its costs, including its distribution costs. Accordingly, in choosing between direct distribution and the use of independent distributors, a monopolist will choose the method which can perform the function at the lowest cost. If distribution by middlemen is most desirable, the manufacturer will sell to middlemen and make its monopoly profit at wholesale; if direct distribution is preferable, the manufacturer will make the monopoly profit at retail.[14] A decision to distribute directly to retail customers will not increase the amount consumers are willing to pay for the product; it will thus not increase the monopolist's profit-maximizing price and should not result in higher prices. Indeed, distributors like petitioners here who do not com-

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passage to which petitioners point in an effort to suggest controversy and uncertainty (Petition at 24-25) was addressed to the very different question of vertical integration into the manufacturing of a product that can be produced by various different combinations of inputs; it has nothing to do with a manufacturer's decision to distribute its product to consumers. F.M. Scherer, *Industrial Market Structure and Economic Performance* 302 (2d Ed. Chicago, Ill. 1980).

[13] A15-16. *See, e.g., Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979); *Knutson v. Daily Review, Inc.*, 383 F. Supp. 1346, 1363-64 (N.D. Cal. 1974), *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 477-78 (D.D.C. 1977).

[14] *See, e.g., Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979).

pete with one another will often charge higher prices than an integrated monopolist as they seek to extract a monopoly profit for themselves.[15]

The likelihood that independent distributors would charge higher prices at retail than would the manufacturer is especially great in the case of newspaper publishers. As the court of appeals recognized, The Star, like many other newspapers, derives most of its revenues from advertising rather than from circulation.[16] Advertising revenue depends on circulation volume, so newspaper publishers have a critical interest in maintaining uniform, low subscription prices in order to maximize circulation.[17] The distributors do not share this interest, for their primary concern is in maximizing their subscription revenues.[18] For this reason, the distributors are likely to charge higher prices at retail than The Star.[19] That is why the presence of The Star as a potential competitor of the distributors was so important—as the district court found, it deterred the distributors from charging even higher prices. A98. But there is no reason to

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[15] *See, e.g., Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979); *Knutson v. Daily Review, Inc.*, 383 F.Supp. 1346, 1362-63 (N.D. Cal. 1974), *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[16] A21. *See Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Knutson v. Daily Review, Inc.*, 383 F.Supp. 1346, 1362-63 (N.D. Cal. 1974), *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *McGuire v. Times Mirror Co.*, 405 F.Supp. 57, 62 (C.D. Cal. 1975).

[17] A21. *See Newberry v. Washington Post Co.*, 438 F.Supp. 470, 477-78 (D.D.C. 1977) and cases cited n.16, *supra*.

[18] *See Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 278 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Knutson v. Daily Review, Inc.*, 383 F.Supp. 1346, 1362-63 (N.D. Cal. 1974), *aff'd*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[19] *See* cases cited in n.18, *supra*.

expect that the distributors are needed to induce The Star to keep retail prices low. The potential competition theory on which petitioners rely is thus flawed, as well as unsupported by the record.

The testing of petitioners' novel potential competition theory with a body of economic knowledge that has been embraced by courts and scholars for years hardly constitutes the creation of "a presumption of legality" out of an "abstract economic theory" as petitioners argue. The appellate court's determination that petitioners' reliance on the potential competition theory was insufficient to carry their burden of proof is correct and, in any event, raises no issue that warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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